Editor's note: Appealed -- reversed & remanded, sub nom. Frances Degnan v. Hodel, Civ.No. A87-252 (D.Alaska Feb. 16, 1989); decision vacated by Order dated Aug. 23, 1989 -- See 95 IBLA 266A th C below.

CLARENCE LOCKWOOD ET AL.

IBLA 85-383, 85-384, 85-385 Decided January 27, 1987

Appeals from three decisions of the Alaska State Office, Bureau of Land Management, reserving public trail rights-of-way across lands in Native allotment applications F-013073, F-029781, and F-030547 for segments of the Iditarod Trail.

Affirmed.

1. Alaska: Native Allotments -- Rights-of-way: Generally

   The Bureau of Land Management may reserve a right-of-way for a segment of the Iditarod Trail in its approval of Native allotment applications. Reserving the right-of-way is an exercise of the discretion vested in the Secretary pursuant to sec. 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982), and the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Alaska: Native Allotments

   The Bureau of Land Management's decision approving a Native allotment application is an interim step in conveying an allotment to the applicant. The final conveyancing instrument is known as a "Native Allotment." The Department retains jurisdiction over the land in a Native allotment application until it issues the final conveyancing document known as a "Native Allotment." Therefore, at any time prior to final conveyancing, the Department may reserve a public use right-of-way for a designated historic trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982).

3. Alaska: Native Allotments -- Constitutional Law: Due Process -- Hearings -- Rights-of-Way: Generally

   In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

APPEARANCES: Colleen DuFour, Esq., Anchorage, Alaska, for appellants;
Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for amicus curiae State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Clarence Lockwood, Richard Ivanoff, and the heirs of Joseph Etageak appeal from separate decisions, dated either January 7 or 8, 1985, of the Alaska State Office, Bureau of Land Management (BLM), affirming as modified, earlier decisions approving Native allotment applications. In the modified decisions BLM approved the allotments subject to public access rights-of-way for segments of the Iditarod Trail. Appellants object to the right-of-way reservations. 1/

On March 28, 1975, BLM approved the Alaska Native allotment applications of Lockwood (F-013073), Ivanoff (F-029781), and Etageak (F-030547), filed under the Act of May 17, 1906, as amended, Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982), subject to pending applications. 2/

On August 15 and September 12, 1983, BLM issued final certificates for the Ivanoff and Lockwood allotments, respectively. No such certificate has been issued for the Etageak allotment.

On January 7 and 8, 1985, BLM amended each original approval decision to reserve a 25-foot right-of-way for a part of the Iditarod Trail. The amended decisions stated in part:

> On March 28, 1975, the Bureau of Land Management approved Native allotment application [application numbers, application name.] That approval is affirmed as modified by the following reservation which will be included in the Certificate of Allotment.

1/ On Apr. 25, 1985, the Board granted appellants' motions to consolidate the appeals of Lockwood (IBLA 85-383), Ivanoff (IBLA 85-384), and the heirs of Etageak (IBLA 85-385), because the cases involve common issues of fact and law. On Aug. 30, 1985, the State of Alaska requested approval to file an amicus curiae brief and submitted a brief in support of BLM's decision. The State's request is granted.
2/ On June 1, 1981, the State of Alaska filed a protest pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1982), against, inter alia, the allotments involved herein thereby precluding their legislative approval under section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982). On Oct. 19, 1981, the State withdrew its protest as it related to the allotments involved here, and on Nov. 27, 1981, BLM dismissed the protest as to the allotments.

A right-of-way, not to exceed twenty-five (25) feet in width for the Iditarod Trail pursuant to the National Trails System Act, 16 U.S.C. 1246(h).

BLM stated in each amended decision that, according to a field examination of the allotment, the historic Iditarod Trail traverses the Native allotment. According to BLM, since the use of the trail predates the claimed use and occupancy of the allotment, the allotment is subject to a right-of-way reservation for continued public access along the trail.

Appellants contend they have fully complied with the statutory requirements of the Native Allotment Act and under the public land laws obtained equitable title to the land described in their allotment applications even though actual patent has not issued. They state "[t]heir equitable rights are not diminished because the Department has yet to issue the actual Certificates of Allotment" (Statement of Reasons at 6). They contend BLM may not reserve these rights-of-way because the rights-of-way diminish their vested property rights.

The issue posed in this case is whether prior to issuance of the "Native Allotment," BLM may modify its decision approving an allotment, to include a right-of-way reservation for a preexisting designated National Historic Trail. 3/

[1] The Iditarod Trail is approximately 2,000 miles long, extending from Seward to Nome, Alaska. It consists of a number of trails and side trails made at different times during the gold rush era. In 1978, the Iditarod Trail was designated a National Historic Trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982). See Edward A. Nickoli, 90 IBLA 273, 276 (1986). Section 7(h)(2) of the Act authorizes the Secretary to reserve rights-of-way for designated trails. 16 U.S.C. § 1246(h)(2) (1982). It provides: "Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails to the extent he deems necessary to carry out the purposes of this chapter." Id. Thus, under that section the Secretary may reserve a right-of-way for the Iditarod Trail in a conveyance.

3/ Confusion exists regarding use of various terms to describe documents issued by BLM in the allotment approval process. In State of Alaska, 45 IBLA 318, 320-21 (1980), the Board explained as follows:

"However, reference to BLM Manual instructions, V BLM 2A.5 (Rel. 154, 12/29/58), reveals an entirely different procedure involving two separate instruments entitled, respectively, the 'Allotment Certificate' and the 'Native Allotment.' These documents are incorporated in the Manual as Illustrations 4 and 5. According to these instructions, when the Classification Officer reported that the allotment application was acceptable, the Adjudication Officer would issue an 'Allotment Certificate,' utilizing the familiar 'Final Certificate' form with appropriate modifications effected by typewritten insertions and strike-outs. Then, according to the instructions, there was further processing of the application by the Classification Officer

Moreover, under the Native Allotment Act, 43 U.S.C. § 270-1 (1970), the Secretary is authorized, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any qualified Alaskan Native. Reservation of a right-of-way for the Iditarod Trail in the subject allotments is within the scope of discretion conferred on the Secretary by the Native Allotment Act. Edward A. Nickoli, 90 IBLA at 276.

[2] Contrary to appellants' equitable rights argument, the Department may amend a decision approving a Native allotment application until the United States is divested of legal title to the land described in the application. Leo Titus, Sr., 89 IBLA 323, 327-28, 92 I.D. 578, 581 (1985). Divestiture occurs when the Department issues the final conveyancing instrument known as a "Native Allotment." Because approval of an allotment application is merely an interim step in conveying the allotment to the applicant, the Department retains jurisdiction over the land in an application even after such approval. State of Alaska, 45 IBLA 318, 320-22 (1980). Accordingly, the Department may amend approval decisions at any time before the "Native Allotment" issues. Leo Titus, Sr., 89 IBLA at 327-28, 92 I.D. at 581. See also Eugene M. Witt, supra. Since the "Native Allotments" had not issued in these cases, the Secretary retained his authority under section 7(h)(2) of the National Trails System Act, 16 U.S.C. § 1246(h)(2) (1982), to reserve a right-of-way for the Iditarod Trail in such a conveyance.

Appellants cite Heirs of Simon Paneak (Paneak), 55 IBLA 305 (1981), for the proposition that once equitable title has passed, the Department has limited discretion in inquiring into the propriety of the conveyance. In Paneak, BLM had approved a Native allotment application, but subsequently determined the land was mineral in character and rejected the application because only nonmineral lands may be allotted under the Native Allotment Act. On appeal, the Board set aside and remanded the case to BLM for issuance of the Native Allotment holding that there was insufficient evidence to support the mineral in character determination. Therein, at page 309 the Board quoted the following language from a small tract case, State of Wisconsin, 65 I.D. 265 (1958):

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fn. 3 (continued)
and the Engineering Officer. Upon completion of their work, the Patent Issuing Officer issued the instrument entitled 'Native Allotment.' This was the instrument which, according to its text, declared that 'the land above described shall be deemed the homestead of the allottee and his heirs in perpetuity.'"

In this case both BLM in its decisions and appellants in their statements of reasons refer to issuance of "Certificate of Allotment" as the final step in the process. In actuality those references should have been to the document styled "Native Allotment," since both Ivanoff and Lockwood received "final certificates" in 1983. As stated in State of Alaska, supra at 321, "the issuance of an 'Allotment Certificate' or 'Final Certificate' does not operate to pass the title, whereas the 'Native Allotment' does so." See also Eugene M. Witt, 90 IBLA 265 (1986).

> The Secretary * * * can vacate the disposal and refuse to issue patent only for proper grounds existing prior to or up to the time equitable title was earned. Thus, if only nonmineral land can be disposed of under a particular statute and an applicant is permitted to earn equitable title to a tract of land on a determination or assumption that the land is nonmineral in character, the disposal of the land can be vitiated only on a subsequent determination that the original finding of nonmineral character was in error and that facts in existence at the time equitable title passed required a determination that the land was mineral in character.

The Board did not rely on this language in making its holding in the case; rather, it cited BLM's failure to provide sufficient evidence to establish that the land was mineral in character. It noted that where land is shown to contain only limited quantities of minerals such that their extraction would not justify the cost thereof, the land is not mineral in character.

Appellants, however, seize on the language quoted in Paneak from State of Wisconsin and argue that since equitable title to the allotments was acquired prior to the passage of the National Trails System Act, that Act may not be utilized as a basis for imposition of the right-of-way.

In Paneak, the issue of whether the land was mineral in character was critical to a determination of the availability of the land for disposition under the Native Allotment Act. The present cases are distinguishable. Herein, there is no question of the availability of the land. Appellants' allotments have been approved. The only question is whether the right-of-way reservation is proper. The National Trails System Act grants the Secretary the authority to make such a reservation in a conveyance. Since the Federal Government retains title to these lands, reservation of the right-of-way is appropriate.

Moreover, in these cases each case record contains a BLM report of October 1972 field examinations which notes the historic Iditarod Trail crosses the respective parcels of land and recommends the reservation of rights-of-way for the trail. Thus, the Secretary in his discretion could have reserved the rights-of-way regardless of the passage of the National Trails System Act. The Paneak decision is not controlling.

Appellants also assert Robert & Patricia Bailey, 89 IBLA 369 (1985), lends support to their equitable rights argument. Bailey involved landowner rights under 43 U.S.C. § 971a through e (1982), not the Alaska Native Allotment Act. In Bailey, the Board found that once a preference right claimant satisfied the statutory requirements, equitable title vested and the Secretary had no discretion in the issuance of a patent. Under the Alaska Native Allotment Act, issuance of an allotment is within the Secretary's discretion. 43 U.S.C. § 270-1 (1970). However, the Secretary's discretion is not unfettered, and he may not arbitrarily deny an allotment to an otherwise eligible applicant. Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976); State of

Alaska v. Thorson (on Reconsideration), 83 IBLA 237, 243 (1984). It is within the Secretary's discretion to define the nature of the grant and to reserve a right-of-way where appropriate. Edward A. Nickoli, 90 IBLA at 276.

[3] Appellants assert the decisions reserving the rights-of-way deprive the allotment applicant of a significant property interest "without even a modicum of due process protections" (SOR at 7). They contend that under Pence v. Kleppe, supra, they are entitled to proper adjudication and an opportunity for a hearing as to the rights-of-way reservations.

The Ninth Circuit held due process requires the Department to give the Native allotment applicant notice and an opportunity for a hearing prior to rejecting an application. Pence, 529 F.2d at 143. Following Pence, the Board established that prior to rejecting an application, BLM must initiate a contest to decide factual issues as to the applicant's compliance with the statutory use and occupancy requirements of the Native Allotment Act. Leo Titus, Sr., 89 IBLA at 326, 327, 92 I.D. at 581; Mary DeVaney, 51 IBLA 165 (1980); John Moore, 40 IBLA 321, 86 I.D. 279 (1979).

The approval of a Native allotment application subject to a right-of-way for a preexisting trail is not properly characterized as a rejection of the application. Therefore, a contest, which is required under Pence when BLM rejects a Native allotment application, is not required in this case. The written notice of the amended decision and the right of appeal to this Board fulfill the Department's due process requirements. Edward A. Nickoli, 90 IBLA at 279; Leo Titus, Sr., 89 IBLA at 327, 92 I.D. at 581.

To support their contention that a hearing is necessary, appellants assert significant questions of fact exist regarding the potentially exclusive use of the allotment. In addition they state "the extent to which the trail has been used by others as well as the actual location of the trail are unresolved factual issues" (Reply at 5). Appellants have raised questions but have failed to identify specific facts in dispute. In the absence of any dispute of material fact, the right to appeal to this Board satisfies their due process rights. Edward A. Nickoli, 90 IBLA at 279.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are affirmed.

Bruce R. Harris
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

August 23, 1989

IBLA 89-562 95 IBLA 261 (1987)	: F-013073, et. al. :	
CLARENCE LOCKWOOD, ET.AL. (ON JUDICIAL REMAND)	: Native Allotments :	
	:	: Clarence Lockwood, 95 IBLA 261 (1987), and order in Frances Ann Degnan, IBLA 85-625, vacated

ORDER

On January 27, 1987, this Board issued its decision in Clarence Lockwood, 95 IBLA 261 (1987), affirming three decisions of the Alaska State Office, Bureau of Land Management (BLM), reserving public trial rights-of-way across lands included in Native allotment applications F-013073 (Clarence Lockwood), F-029781 (Richard Ivanoff), and F-030547 (Joseph Etageak (deceased), respectively, for portions of the Iditarod National Historic Trail, in accordance with section 7(h)(2) of the National Trail System Act (NTSA), as amended, 16 U.S.C. § 1246(h)(2) (1982). On March 6, 1987, in reliance on the Lockwood decision, the Board issued an order in the appeal of Frances Ann Degnan, IBLA 85-625, affirming a BLM decision reserving a right-of-way for the Iditarod Trail Across the Degnan allotment (F-013058).

Thereafter, three of the Native allotment applicants, Degnan, Lockwood, and Betsy Pleasant, as the heir of Etageak, filed a suit for judicial review of the Board's action. Degnan v. Hodel, No. A87-252 Civil (D. Alaska, filed May 29, 1987). On February 16, 1989, the district court entered a summary judgment order (Order I) reversing the Board's Lockwood decision and remanding the case to the Secretary. The court, finding the principles set forth in State of Alaska v. 13.90 Acres of Land, 625 F.Supp. 1315 (D. Alaska 1985), to be controlling, ruled that the Department had erred in subjecting the plaintiffs' allotments to rights-of-way under the NTSA. The Government moved the court to reconsider or amend its February 16, 1989, order. By order entered May 6, 1989 (Order II), the court affirmed its earlier order, stating:

> [W]ith the use determinations having been made in favor of the plaintiffs and the applications having been

> generally accepted subject only to survey, the lands in question are deemed segregated and the plaintiffs had equitable title before enactment of the 1978 National Trials System Act amendments [designating the Iditarod Trail as part of the National Trails System] which defendants employed to attempt modification of plaintiffs' applications.

Order II at 4.

On July 12, 1989, counsel for BLM filed with the Board, in accordance with 43 CFR 4,29, a "Report of Remand." BLM states that the court's orders require that the Board vacate its Lockwood decision and its Degnan order and reverse the four BLM decisions holding that the four Native allotment applications are subject to rights-of-way for the Iditarod Trail. Counsel assets that those actions are required by the express terms of the court's orders, but that BLM is not precluded from making a further review of the allotments, and, if necessary, taking appropriate corrective action. Thus, much of counsel's report is devoted to urging the Board not to read the court's of Degnan orders so broadly as to affect the general authority of the Department to take corrective action prior to issuance of the final document passing title to the Native.

On July 26, 1989, counsel for the Native allotment applicants filed a "Response to Report of Remand." Therein, counsel argues that it is unnecessary for the Board to interpret the breadth of the court's orders in Degnan orders may be addressed in future cases. He requests that the Board ignore BLM's plea for an interpretation of the Degnan orders. In the alternative, however, he asserts that the court's orders stand for a proposition more expansive than the very narrow interpretation exhorted by counsel for BLM.

We decline to indulge in a exposition of the ramifications of the court's Degnan orders. Clearly, it is unnecessary for us to do so in carrying out the directions of the court. We agree with counsel for the Native allotment applicants that arguments concerning the impact of those orders may be presented in future cases. 1/ In its orders, the court

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1/ Should BLM determine that it is necessary to take corrective action in any of the present cases and that it had the authority to do so, it would act by decision which would be subject to the right of appeal to this Board. At present, BLM has not indicated that it believes corrective action is required in any of these cases; therefore, its request for an interpretation of the Degnan orders is, in essence, a request for an advisory opinion. The Board does not render advisory opinions. Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 99 IBLA 274 (1987).

reversed our Lockwood decision and remanded the matter to the Secretary for further action consistent with the orders. Therefore, we vacate our decision in Lockwood and our order in Degnan and reverse the four BLM decisions that held those allotments to be subject to rights-of-way for the Iditarod Trail. 2/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in Clarence Lockwood, 95 IBLA 261 (1987), is vacated, the Board's unreported order in Frances Ann Degnan, IBLA 85-625, dated March 6, 1987, is vacated and the four underlying BLM decisions are reversed.

Bruce R. Harris
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

2/ The court's orders did not directly address the Board's order in Degnan; however, since the Board's Degnan order was based on Lockwood, reversal of Lockwood necessitates that we vacate that order and reverse the underlying BLM decision.

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